

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Kenneth L. Bozeman,

Complainant,

v.

Hertz Corporation,

Respondent.

**DECISION ON COSTS AND MOTION  
TO RECONSIDER**

The above-entitled matter is now before Administrative Law Judge Allen E. Giles after issuance of FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on January 20, 1997, which scheduled a hearing on damages and costs. A hearing on these issues was held on February 26, 1997.

Ellen G. Sampson, Leonard, Street and Deinard, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402, and Paul Tschirhart, General Counsel, the Hertz Corporation, 225 Brae Boulevard, Park Ridge, New Jersey 07656, appeared on behalf of the Respondent Hertz Corporation.

Erica Jacobson, Assistant Attorney General, Office of Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Commissioner of Human Rights.

In a letter dated April 3, 1997, the Judge encouraged the parties to settle the final issues remaining in the case. On April 22, 1997 the Judge was informed by letter that an order would be necessary because the Parties were unable to reach a satisfactory resolution. For purposes of consideration of this matter the record closed on April 22, 1997.

**NOTICE**

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Pursuant to Minn. Stat. § 363.071, subd. 2 and 3, this Order is the **final decision** in this contested case proceeding and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

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## STATEMENT OF ISSUES

What are the Minnesota Human Rights Department's hearing and litigation costs?

Whether Hertz' Motion for Reconsideration and an Amended Order should be granted.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. On January 15, 1997, the FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ("January 15th Order") was issued in this docket. The January 15th Order concluded that Respondent violated the Minnesota Human Rights Act by committing unfair discriminatory practices in connection with the rental of an automobile to Kenneth Bozeman in July 1994. The Order directed that Hertz pay Complainant punitive damages and damages for mental anguish and suffering. The Order also directed that Hertz pay a civil penalty of \$50,000.00.

2. The January 15th Order scheduled a hearing on damages and costs. The Judge directed the Parties to submit evidence regarding reasonable attorney's fees and litigation and hearing costs incurred by the Minnesota Department of Human Rights. A hearing was scheduled for February 27, 1997, but later was changed to February 26, 1997 at the request of the Parties.

3. On February 11, 1997, the Department of Human Rights filed a Petition for Reimbursement of Costs to cover litigation and hearing costs incurred by the Department as of the date of issuance of the January 15 Order. At that time the costs amounted to \$9,060.20 or 101.8 hours at \$89.00 per hour. The Petition noted that the amount of litigation hearing costs would increase if the Judge was required to spend additional time on the matter. As of the date of this Order, hearing costs either charged or to be charged to the Department of Human Rights by the Office of Administrative Hearings for the period February 1 to May 19, 1997 amounts to 31.9 hours or \$2,839.10. Exhibit A Therefore, the total hearing and litigation costs is \$11,899.30.

4. On February 19, 1997, Hertz filed a motion requesting that the Judge modify language contained in the Memorandum and reduce the amount of the civil penalty. Prior to the hearing on damages and costs, Hertz entered into a financial settlement with Complainant. Complainant has had no further involvement in this proceeding. The civil penalty and hearing and litigation costs incurred by the Department are the only financial issues unresolved by the settlement.

5. A hearing was held on February 26, 1997 to discuss the unresolved issues. At the hearing, Hertz indicated that the Department's hearing and litigation costs were not at issue and that the Company would pay those costs when they are identified. With respect to the civil penalty, Hertz initially challenged the amount of the civil penalty, however, the Company's primary concern addressed the language contained in the Memorandum. The language is more fully identified by Hertz in a letter dated March 3, 1997.

6. Hertz has made no effort to establish that the civil penalty ordered in this proceeding or the hearing and litigation costs to be awarded in this proceeding will result in financial hardship or that the Company will have a financial inability to pay either the civil penalty or the hearing and litigation costs.

7. Insofar as it is necessary, the Findings of Fact contained in the January 15th Order are incorporated in this Order and are expressly adopted.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. Hearing and litigation costs are authorized by Minn. Stat. § 363.071, subd. 7. The appropriate costs for this proceeding totals \$11,899.30.

2. Respondent Hertz has failed to establish a reasonable justification for relief from the decision consistent with the requirements of Minnesota Rules of Civil Procedure, Rule 60 and Anchor Casualty Co. v. Bongards Co-operative Creamery Association, 253 Minn. 101, 91 N.W.2d 122 (1958).

3. Minn. Stat. § 363.071, subd. 2 requires that the Judge determine an appropriate civil penalty to the State when a public accommodation violates the provisions of the Human Rights Act. The Judge must take into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was intentional. The Judge has properly taken these matters into account.

4. Insofar as it is necessary, the Conclusions contained in the January 15th Order are incorporated in this Order and are expressly adopted.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

## ORDER

IT IS HEREBY ORDERED:

1. This Order is the final decision in this case and expressly incorporates and adopts the FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER issued on January 15, 1997.
2. Respondent Hertz' motion for reconsideration is denied.
3. Respondent Hertz shall pay to the Minnesota Department of Human Rights \$11,899.30 as payment for litigation and hearing costs.
4. This Order is effective on the date it is signed by the Administrative Law Judge.

Dated this 21st day of May, 1997.

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ALLEN E. GILES  
Administrative Law Judge

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## MEMORANDUM

### Final Decision

The Court of Appeals has expressed a preference that decisions in Human Rights Act proceedings should combine liability and damage/financial issues before the issuance of a final decision. See, for example, Schelin v. PGI Companies, Inc., OAH Docket No. 3-1700-8948-2 (June 28, 1995), Court File No. \_\_\_\_\_. The Court of Appeals has suggested that a Human Rights Act appeal is not ripe for consideration unless findings and conclusions also address all the damage issues. Therefore, the final decision in this case is not being rendered until the damage issues are determined.

### Investigation of the Charge of Discrimination

Hertz has requested that the Judge strike the language appearing in the Memorandum relating to the adequacy or scope of the Company's investigation. Hertz claims that the record does not support the language contained in the Memorandum. The language objected to by Hertz is as follows:

Page 19, second paragraph:

First, there are a series of suggestions that Hertz has not taken the complaint of race discrimination seriously or has not acted as a reasonable, serious person would in handling this complaint of race discrimination. For example, it does not appear that Hertz ever investigated the complaint, i.e., no one talked to Mary Breseden. A company that takes a complaint such as this seriously would at least have investigated the matter by speaking with Mary Breseden to ascertain whether she needed additional training and consider her racial views. Instead, she has continued to work for Hertz, free to continue to express her racial views in the conduct of Hertz' business.

Page 20, first paragraph:

Except for a few weeks before the trial, the Company appears to have been inattentive to this matter. Based on this record, it appears that the Company has not taken this matter seriously.

Page 20, second paragraph:

The Judge believes that Hertz' response to the Complaint, particularly its failure to investigate, has been reckless and inconsistent with the actions of a reasonable person concerned with complying with the Human Rights Act.

Page 21, first paragraph:

The Judge believes that the attitude and conduct of Hertz Corporation as manifest in its failure to investigate shows a deliberate disregard for the protected civil rights of Kenneth Bozeman. Hertz' attitude of disregard is further demonstrated by the Company's failure to identify Mary Breseden until a few days before the hearing.

During the trial, Hertz made no effort to establish whether it had conducted an investigation of Kenneth Bozeman's charge of discrimination. The Judge allowed as witnesses Mary Breseden, Hertz Counter Representative and John Cherry, the City Manager of the Hertz Corporation's Minneapolis-St. Paul International Airport Office. These witnesses provided no testimony about Hertz' investigation. In support of its motion Hertz has submitted an affidavit of Mr. Cherry which describes the investigation he conducted. Based on Mr. Cherry's affidavit Hertz argues that there is no basis for the conclusion that the Company failed to undertake a bona fide investigation.

The Department of Human Rights opposes Hertz' motion for reconsideration. The Department asserts that the Judge can not consider Mr. Cherry's affidavit because his decision must be confined to the record developed for decision in this case, citing Minn. Rules pt. 1400.8100, subp. 1, which provides:

No factual information or evidence which is not a part of the record shall be considered by the Judge . . . in determination of a contested case.

The Department argues that the time for Hertz to submit its factual information was at the hearing, not after the record had closed. The Department further argued that Hertz had failed to show based on the record that the language in the Order should be changed.

The Judge's statement in the Memorandum is based on the record of this proceeding. The Judge stated in the Memorandum that it did not appear that Hertz had conducted a bona fide investigation into this matter, a fact demonstrated by the failure to identify Mary Breseden as the Hertz Counter Representative who dealt with Mr. Bozeman until shortly before the trial. The record contains no other evidence regarding the Company's investigation of the complaint.

The Company relies on the Affidavit of Mr. John Cherry, the City Manager of the Hertz Corporation's Minneapolis-St. Paul International Airport Office. Mr. Cherry testified at the hearing. He could have presented this testimony at that time. The Judge does not believe that it is appropriate to consider the testimony at this time.

The Administrative Procedure Act requires that a decision in a contested case proceeding be confined to the record developed for the purpose of making the decision. Minn. Stat. § 14.60, subd. 2 states in part as follows:

. . . No factual information or evidence shall be considered in the determination of the case unless it is part of the record. . . .

Minn. Stat. § 14.62, subd. 1 states in part as follows:

Every decision and order rendered by an agency in a contested case shall be in writing, shall be based on the record and shall include the agency's findings of fact and conclusions on all material issues. (Emphasis added.)

Based on the foregoing, the Judge is prohibited from considering non-record evidence in the determination of this case. However, there are circumstances where it is appropriate to grant relief from a decision in order to prevent manifest injustice. A party may obtain relief from a judgment under circumstances equivalent to those arising under Rule 60 of the Minnesota Rules of Civil Procedure. It is appropriate for the Judge to consider and apply Rule 60 relief where appropriate in a proceeding under the

Administrative Procedure Act. In the Matter of the Public Utilities Commission, 417 N.W.2d 274, 281-82 (Minn. App. 1987).

The Judge has treated Hertz' Motion for Reconsideration and Amended Order as a motion under Rule 60 of the Minnesota Rules of Civil Procedure. That rule authorizes the parties to receive relief from a judgment or decision for the following reasons:

- (a) mistake, inadvertence, surprise, or excusable neglect;
- (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;
- (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (d) the judgment is void;
- (e) the judgment has been satisfied, released, or discharged or prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (f) any other reason justifying relief from the operation of the judgment.

Upon consideration of the application of Rule 60, the Judge concludes that none of the reasons for which relief from the decision or order may be granted under Rule 60 applies to the instant case. Hertz simply argues that the Judge's statements in the Memorandum are not supported by facts contained in the record. Hertz does not identify any newly discovered evidence, mistake or error that should be corrected.

Finally, the Judge has reviewed John Cherry's affidavit. If it were appropriate to consider Mr. Cherry's affidavit as a part of this record, it would not change the Judge's view of the adequacy of Hertz' investigation of the Complaint. Instead of diminishing the basis for the Judge's view that Hertz' investigation was inadequate, Mr. Cherry's affidavit provides a factual basis for the conclusion. For example, Mr. Cherry's affidavit suggests that Hertz waited more than a year before doing any investigation into the charge of discrimination. The charge of discrimination was filed in November 1994 and Mr. Cherry admits that he became aware of it at that time. His affidavit suggests that the next action he took was sometime between January and May 1996 when he supplied his employer with a list of employees working at the Rochester Hertz counter. Even though all Hertz employees serving the Rochester counter denied having Mr. Bozeman as a customer, Hertz knew or should have known that Mary Breseden was

involved in the rental transaction based upon her employee I.D. number appearing on the auto rental transaction. Ex. 4, Tr. 121-22. Therefore, even if the Judge were authorized to consider the affidavits, the Judge would not be persuaded to arrive at a different result. The affidavits simply confirm that Hertz failed to conduct a bona fide investigation of the matter.

#### Reduction of Civil Penalty

Hertz also requests that the civil penalty awarded in this case be reduced. Hertz makes this claim based on comparisons with other civil penalty awards in Human Rights Act cases. The Department opposes this request, asserting that the record does not support any reduction in the civil penalty.

The Company's comparison of the civil penalty in this case to that awarded in other cases does not also address financial resources of the particular respondents. It is unclear what the financial resources are of the respondents identified by Hertz. The Judge is required to take into consideration a company's financial resources for the purpose of making the penalty a meaningful deterrent to any further violations of the Human Rights Act. What will be a meaningful deterrent for a corporation such as Hertz will be different from that required of a small business operation. Hertz has had an opportunity to present factual claims or other argument regarding its financial resources. The financial resources of Hertz Corporation is not at issue in this case.

This case involves a determination that Hertz engaged in intentional race discrimination while the Company acted as a public accommodation renting automobiles in the State of Minnesota. Minn. Stat. § 363.12 provides in part as follows:

Subdivision 1. It is the public policy of this state to secure for persons in this state, freedom from discrimination;

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(3) in public accommodations because of race, color, creed, religion, national origin, sex, sexual orientation, and disability;

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Subdivision 2. The opportunity to obtain . . . full and equal utilization of public accommodations . . . without such discrimination as is prohibited by this chapter is hereby recognized as and declared to be a civil right.

Intentional race discrimination is offensive to the civil rights policy of the State of Minnesota. Failure to investigate a race discrimination claim is contrary to the State's policy and inconsistent with a reasonable effort to comply with that policy. In such



circumstances, it is necessary to award a civil penalty that is adequate enough to deter further such conduct.

#### Settlement Efforts

- It is unfortunate that this case, given how close it was to settlement, did not settle. Although the Judge was not privy to all the issues involved in the settlement discussions, based on the hearings he believed that language in the Memorandum was a major stumbling block. In order to encourage parties to settle the Judge indicated to the Parties that he would change the memorandum language if that would help achieve a settlement. Unfortunately, the Parties could not resolve other issues.

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